IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
PINSON, BRIAN SCOTT and	)	**Case No. 99-20195**
PINSON, SANDRA LEE	)	
	)	
Debtors.	)	**SUPPLEMENTAL MEMORANDUM**
	)	**RE: CONFIRMATION**
_____	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

G. W. Haight, Coeur d'Alene, Idaho for Debtors.

Derrick O'Neill, JONES, GLEDHILL, HESS, ANDREWS, FUHRMAN, BRADBURY & EIDEN, Boise, Idaho for U.S. Bank.

C. Barry Zimmerman, Coeur d'Alene, Idaho, chapter 13 Trustee.

This chapter 13 proceeding was filed in February 1999 and now, over a year later, it is in a posture to be confirmed. This decision addresses two outstanding issues which had to be resolved before confirmation of the plan could be ordered.

DISCUSSION

Brian and Sandra Pinson ("Debtors") filed their petition for relief in February 25, 1999. The confirmation hearing process started in May 1999, and has continued fitfully since. Issues have been raised, and finally resolved, with two creditors, US

Bank[1] and American General. The plan has been amended *seriatim* and presently before the Court for confirmation is the amended plan filed February 29, 2000 (the "Plan").

The Plan proposes payments of $400.00 for 60 months. Among other things, it proposes that payments to the Debtors' lawyer G. W. Haight ("Counsel") through the plan will be $2,500.00. This is in addition to $510.00 in fees he received prebankruptcy. The Plan provides that fees shall be paid over 15 months or, in the Trustee's discretion, a shorter period.

During the confirmation hearings held in 2000, several impediments to confirmation were raised by the Trustee and addressed by Counsel. All have been resolved as of this date with the exception of two. The first is the allowance of Counsel's suggested fees. The second is the concern of the Trustee that the Plan fails to address a "late filed" claim of the Internal Revenue Service ("IRS").

Attorneys' fees[2]

Counsel filed an initial Rule 2016(b) disclosure indicating that he charged a "flat fee" of $1,000.00 for representing the Debtors, with $500.00 having been prepaid and $500.00 to be paid through the plan. The original plan was consistent with this

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[1] The Trustee asserted that an issue with U.S. Bank, resulting from default of an agreed "drop dead" order, had to be resolved before confirmation could occur. This matter has since been resolved by further agreement and the most recently amended plan.

[2] Counsel is well aware, given other recent litigation, of the issues related to allowance of compensation to chapter 13 debtors' counsel, and the Code provisions, Rule requirements, and case law controlling those matters. The same will not be repeated here.

representation. Subsequent amended plans increased the fees to be paid, ultimately to the $2,500 referred to in the February 29 Plan.

Counsel filed, on April 19, 2000, an Application for allowance of compensation. The Application alleges total fees and costs incurred of $3,347.94 with $675.00 previously paid,[3] resulting in a balance of $2,672.94 for fees and costs (photocopies and facsimile charges). Services are charged at rates of $95.00 per hour for Counsel and $45.00 per hour for his paraprofessionals.[4] This Application was served on the Debtors and the Trustee on April 19. As of this date, no objections have been lodged by those parties. While creditors were not served with the Application, they did receive the amended plan which disclosed that Counsel sought $2,500 in fees.

The Application format leaves much to be desired. In an age of easily generated computer documents, there is little excuse for this type of "fill-in-the-blanks" form, which is difficult to read and follow, and is awkwardly adapted to the specific circumstances of the case. As to the time entries attached to the Application, they remain for the most part as terse, unspecific and generally unenlightening as those in the recently decided *Brian Jordan* matter in which Counsel was the applicant. The Court should not have to engage in assumption and conjecture in order to evaluate the reasonableness and necessity of the services

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[3] This $675.00 represents a $165.00 payment for filing fees, and $510.00 toward fees (rather than $500.00 as stated in the 2016(b) disclosure and Application).

[4] The Application sets out a "per minute" rate for Counsel of $1.58 and for the paralegal of $.58, which yield effective hourly rates of $94.80 and $34.80 respectively.

rendered. The burden is on the applicant to provide an appropriate, complete and satisfactory record in support of the requested compensation.

Nevertheless, the Court here gives the benefit of the doubt to the applicant, and will allow the bulk of the fees requested, with only the limited specific reductions noted below.

As discussed in *Jordan*, it incumbent on Counsel as applicant to establish that the work performed by his paralegal staff is truly in the nature of separately compensable paralegal services rather than clerical work. Not every call taken and placed, or letter reviewed or prepared, implicates the delivery of such services. Similarly, Counsel should not charge attorney rates for his own time spent on what appear to be paralegal or clerical chores without explanation.

The following entries in the Application lack the required explanation, detail and/or justification to show that they were something other than clerical services, and they will therefore be disallowed:

12/21/98	Mailed petition and plan to client	24 min.[5] (.4 hour)	$13.92
3/19/99	Prepared and mailed copy of schedules and Plan to Gene Reno and plan to Lewis-Clark Federal Credit Union	24 min. (.4 hour)	$13.92
3/23/99	Reminder to client re 341(a)	18 min. (.3 hour)	$10.44
6/2/99	File First Amended Plan w/court	12 min. (.2 hour)	$ 6.96
10/22/99	Service re Notice of Hearing	30 min. (.5 hour)	$17.40
12/3/99	Fax Stip back to O'Neill	12 min. (.2 hour)	$ 6.96
12/20/99	Photocopy and return order to	18 min. (.3 hour)	$10.44

[5] Time on the first attachment to the Application is billed in minutes, though most of these entries are capable of conversion to the more traditional tenths of an hour. Some of Counsel's entries on the second attachment are in irregular time entries (e.g., 1.35 hours, 2.13 hours, 1.67 hours).

Bob Brower re adequate protection to Lewis and Clark Credit Union

TOTAL 138 min. (2.3 hr.) $80.04

A reduction of $80.04 will be made.

Additionally, the paralegal entries on May 28, 1999 for 66 minutes (1.1 hour) and 72 minutes (1.2 hours) appear to be related to serving notice of hearing on confirmation of an amended plan. While preparation of the notice of hearing and certificate of service might be compensable, photocopying and serving the notice requires no more than clerical skill. Also, expending 2.3 hours for preparing and serving the described pleadings is excessive. There further appears to be some duplication between the two entries. For all these reasons, the total charge of $80.04 for these two entries will be reduced by $50.00.

Counsel's own entry on December 17, 1999, to "[a]ccess RACER; print and review case docket" is charged at $66.50, representing 42 minutes (.7 hour) at his rate of $95.00 per hour. Accessing RACER and printing the docket is something that clerical staff can easily do. Assuming that this task was but a minuscule portion of the 42 minutes charged, nothing explains why such a lengthy review of the docket was required. The next entry on that same day charged 71 minutes (just shy of 1.2 hours) for preparing an amended plan and revising a creditor's stipulation. Even assuming some need for docket review prior to amending the plan or stipulation,

the bulk of the first December 17 entry remains unjustified, and a reduction of $50.00 will be made.

Entries of paralegals related to preparation of the fee application appear on 12/20/99, 4/4/00, 4/12/00, 4/13/00. These charges are for 348 minutes (5.8 hours) at $34.80 per hour, totaling $201.84. Counsel also on 4/18 charged 2.13 hours at $95.00 per hour for a total of $202.35 for "Further review and preparation of Fee Application and Affidavit." Thus, $404.19 is requested for this task. The Court finds that request excessive.

The Application text is, as noted, a form document. Little effort would be required to insert the information in its blanks. The Application's attached time detail appears to be generated from an internal time billing system, and the second attachment is a bill to the client. The Court presumes that the time entries were contemporaneously made when services were rendered.[6] Nothing explains why

[6] Contemporaneous recording of time is the preferred practice. If the detail as to time spent is reconstructed after the fact from other sources or file documents, the accuracy of the charges is called into doubt. And it would be inappropriate to charge the client or the estate for the extra effort required to reconstruct the billing records.

7.93 total lawyer and paralegal hours was required to prepare this Application.[7]

In light of the foregoing, the Court will reduce the charges regarding the Application by $200.00. § 330(a)(2), (3) and (6)

Counsel asks for payment under the Plan of $2,672.94. With the above-described reductions of $380.04, the Trustee shall distribute $2,292.90 to Counsel through the Plan.

In light of the magnitude of fees allowed, the Court will not require the Trustee to fully distribute this $2,292.90 within a maximum of 15 months as the Plan states. That limitation will be deleted. The Trustee may use his discretion in the length of time needed to fund the fee allowance without unduly interfering with distributions to creditors, who have waited a long time for this Plan to reach fruition. If the Trustee and Counsel cannot agree on this issue, they may bring it back before the Court for resolution.

The IRS "late claim"

In the schedules, the Debtors listed no priority debts. Their mailing matrix did not include the IRS. Thus, the IRS did not receive the notice of the filing, first meeting, and claim bar dates initially issued by the Bankruptcy Noticing Center. That notice set

[7] The Court has previously noted in chapter 13 cases that the key is providing the required substantive detail concerning services rendered. Most printout formats for internal law office use generated by billing software are understood by the Court and acceptable without adaptation, so long as time is initially entered with attention to the need for detail regarding services rendered and the time spent. Thus, little effort need ordinarily be spent in attaching this information to a affidavit or application.

claim bar dates of June 27, 1999 for nongovernmental creditors, and August 28, 1999 for governmental creditors.

On March 14, 2000, the IRS filed a claim, No. 31, in the amount of $1,910.66 as a priority claim for the Debtors' 1997 income tax liability. The proof of claim indicates that the assessment was made on November 8, 1999.

The Trustee expressed a concern that this claim was "late filed" and would either need to be included in the Plan via amendment as a priority payment, *see* §§ 1322(a)(2) and 1325(a)(1), with notification to all creditors of such amendment, or be objected to by the Debtors on the ground that it was filed after the applicable bar date. *See* § 502(b)(9).

Counsel insisted, at earlier confirmation hearings, that he need do nothing. At the last hearing held on April 19, he finally explained his reasoning. This involved an interpretation of §§ 501(d), 502(a), 502(i) and 507(a)(8). Simplified here, he contends that while the IRS claim arose post-petition, it is treated as if it arose prepetition; that a filed proof of claim is deemed allowed unless a party in interest objects to it, and to date no party has done so; and that the IRS asserts a proper priority claim, and the Plan provides that such claims are to be paid.

This argument ultimately leaves the issue in limbo. Counsel's approach "dares" the Trustee to object. If he doesn't, he must pay the claim as the Plan and § 1322(a)(2) require even though he feels the claim is tardily filed and such payment would prejudice other creditors. If he did successfully object and the claim is disallowed for distribution, Counsel's clients may be exposed to a potentially

nondischargeable debt not covered by the Plan or, alternatively, they would be required to modify the Plan to deal with it. There is no persuasive reason offered why the day of reckoning should be postponed.

The analysis of Counsel goes part of the way toward resolving the matter, but stops short of facing the core issue of whether the IRS claim is in fact tardily filed and thus potentially disallowable.

The Court independently determines, from a review of the entire record, that the claim would in all likelihood be found proper and allowable in the event of an objection. Thus, it appears that the Trustee can and should distribute funds in full satisfaction of that claim, as § 1322(a)(2) requires and the language of the Plan contemplates.

This conclusion stems from the fact that the IRS never received notice of the pendency of this bankruptcy, according to all the certificates of service and mailing in the Court's file, until it was served on February 28, 2000 with the Debtors' amended Plan and notice of the March 22 confirmation hearing. The IRS was added, by handwritten insertion, to the mailing matrix used by Counsel for service of this pleading.

Two additional provisions of the Code thus become applicable. The first is § 502(b)(9) which provides that a claim may be disallowed as tardily filed unless it fits within the exceptions set forth in § 726(a)(1), (2) or (3). The second provision is § 726(a)(2)(C) which insulates tardily filed claims if (i) the creditor did not have notice or knowledge of the case in time for timely filing of the claim and (ii) the claim is filed in

time to permit distribution. Those requirements are met here. Thus, under these provisions, in addition to those relied on by Counsel, it appears the claim of the IRS is unobjectionable and can be treated as timely filed. Since it is deemed timely under this analysis, there is no need for an amendment on notice to other creditors in order to fund a "late filed" claim.

CONCLUSION

For the foregoing reasons, the Plan will be confirmed. In doing so, fees and costs are allowed Counsel in the amount of $2,290.90, to be paid by the Trustee in such installments as may be agreed or set by further Order. Additionally, the claim of the IRS, No. 31, is *prima facie* allowable and valid, and appears timely filed under the above analysis, and shall be paid by the Trustee as § 1322(a)(2) and the Plan require. The issues regarding the Debtors' default of their stipulation with U.S. Bank have been resolved by agreement. The Trustee has advised of no other impediments to confirmation.

Counsel shall lodge a proposed form of confirmation order, bearing the Trustee's endorsement, within fifteen (15) days of the date of this Order.

Dated this 11th day of May, 2000.